JD–113–16
Atlanta, GA

STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INSIGHT GLOBAL, LLC

and Case No. 15–CA–161491

DALE FIRMIN, an Individual

Alexandra K. R. Schule, Esq.
for the General Counsel.
Lauren S. Novak, Esq.
for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in New Orleans, Louisiana on May 16, 2016. Dale Firmin, an Individual (the Charging Party) filed the instant charge on October 7, 2015,[1] and amended charges on December 1, 2015, December 18, 2015, and February 2, 2016. The General Counsel issued the complaint on February 26, 2016, alleging that Insight Global, LLC (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by unlawfully maintaining the following four rules in its Contract Employee Agreement (CEA): Section 11 – "Confidentiality and Data Security," Section 15 – "E-Mail and Internet Policy," Section 18 – "Non-Disparagement," and Section 21 – "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims."[2] In its answer, the Respondent denies that it violated the Act as alleged.

On the basis of the entire record,[3] my determination of credible evidence, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] All dates are in 2015 unless otherwise indicated.

[2] The complaint further alleged that Respondent violated Section 8(a)(1) by refusing to hire the Charging Party because he refused to sign the Contract Employee Agreement's "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims." Thereafter, the parties reached a settlement with regard to the refusal to hire allegation, and on that basis, the General Counsel issued an amendment to the complaint dated April 28, 2016, withdrawing the refusal to hire allegations set forth in paragraphs 6(b) and 6(c) of the complaint. (GC Exh. 1(m))

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Brief." for the General Counsel's Brief; and "R. Brief." for Respondent's brief.

Findings of Fact

I. JURISDICTION

A. Jurisdiction in General

The Respondent, a limited liability company with an office and a place of business in Atlanta, Georgia, has been engaged in the operation of a staffing services firm. Annually, in conducting its operations, the Respondent performed services valued in excess of $50,000 in states other than the State of Georgia, and purchased and received at its Atlanta, Georgia facility good valued in excess of $50,000 directly from points outside the State of Georgia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. Jurisdiction Pertaining to the Allegations in the Amended Charges

The Respondent alleges that the Board lacks jurisdiction over the allegations in the three amended charges and that those allegations should therefore be dismissed. The initial charge in this case filed on October 7, 2015, alleges that the Respondent violated Section 8(a)(1) of the Act by "maintaining an unlawful rule concerning forced arbitration" and by refusing to hire Firmin in retaliation for his protected concerted activities based on his "complaints about unlawful provisions of the contract." (GC Exh. 1(a)) Thereafter, Firmin filed an amended charge on December 1, 2015, a second amended charge on December 18, 2015, and a third amended charge on February 2, 2016, alleging that the Respondent's rules pertaining to confidentiality and data security, email and internet policy, and non-disparagement were also unlawful.[4]

In the Respondent's answer to the complaint, it asserts as an affirmative defense that the Board lacks jurisdiction over the allegations in the amended charges which relate to Sections 11 (Confidentiality and Data Security Rule), 15 (Email and Internet Policy Rule), and 18 (Non-Disparagement Rule) "because the charges were solicited by the Board and the General Counsel and are not connected to the allegations raised by Firmin in his initial charge." (GC Exh. 1(i))[5] The Respondent argues in its brief that "[a]lthough [it] was precluded from putting on testimony [regarding the jurisdiction issue], the overwhelming documentary evidence suggests that [Firmin] did not raise the additional claims on his own." (R. Br. at p. 34).[6] In support of its

[4] A copy of the third amended charge filed on February 2, 2016, is not found in the record. (GC Exh. 1) However, the Respondent admitted that the third amended charge was filed in its answer to the complaint. (GC Exh. 1 (i))

[5] The Respondent therefore does not assert a lack of jurisdiction with regard to the allegation that the Respondent's binding arbitration rule violates the Act. (Tr. 50)

[6] Respondent is referring to the fact that in a pretrial conference call with the parties, it raised the issue of subpoenaing Firmin to testify specifically with regard to his filing of the amended charges. The General Counsel stated that it would object to such testimony as lacking relevance. In that conference call, I indicated to the parties that such testimony would not be relevant based on the well- established case law, and on that basis I indicated that at trial I would sustain any objections to such testimony. The Respondent again raised that issue at the hearing in this matter, even though it had not subpoenaed Firmin to testify for that purpose. In any event, at the hearing I reaffirmed my pretrial determination, and ruled that such testimony would not be relevant and would be precluded from the record. (Tr. 54)

defense, Respondent offered into evidence various email communications that occurred prior to or shortly after the filing of the initial charge, between Firmin and Respondent's recruiter, Michelle Azzarello, and between Firmin and Respondent's legal counsel, Lauren Novak, Esq. and Henry Sledz, Esq. (R. Exh. 1 and 2) The Respondent asserts that the complaints raised by Firmin during those initial communications with Respondent and his allegations in his initial charge were "narrow and specific" as he only alleged that the arbitration clause violated the Act. (R. Brief at p. 34) Respondent further argues that "the documentary evidence suggests that [Firmin] did not raise the additional claims on his own" and "[i]t must therefore be inferred that they were solicited by the Region." (R. Br. at p. 34)

The Respondent's assertion that the three amended charges are unrelated to the allegations in the initial charge and that they were solicited by the Board and General Counsel lack merit. Initially, I note that the Respondent does not allege that the Board or the General Counsel's Regional Office agents forced or coerced Firmin into amending his initial charge against his will.[7] Furthermore, the record fails to establish that the amended charges were in any way unlawfully solicited by the General Counsel or the Board. The record also establishes that the CEA provisions alleged to be unlawful in the amended charges are related to the allegations in the initial charge. The policies alleged in the amended charges, as well as policy alleged in the initial charge, are all contained in the Respondent's CEA.

In addition, the email exchanges Respondent relies upon in support of its argument actually establish that Firmin was concerned with, and objected to, allegedly unlawful provisions of the CEA in addition to the arbitration policy. (R. Exh. 1 and 2) In an email to Azzarello dated October 1, 2015, prior to the initial charge being filed on October 7, 2015, Firmin informed Respondent that he had "a few issues regarding the contract employment agreement," which consisted not only of an objection to the neutral binding arbitration provision, but also to provisions concerning "confidential information" and the "email and internet policy." (R. Exh. 1) Besides specifically expressing his objection to the email policy and the confidentiality policy, Firmin noted in an October 5 email to Azzarello that "your contract [has] some very serious violations of Section 8 of the National Labor Relations Act" and "[t]here are a multitude of other major violations of Federal and State laws and I will be making the appropriate complaints to those agencies shortly" (R. Exh. 1) Firmin also informed Respondent's legal counsel that "[y]our client's contract violates such a multitude of laws" (R. Exh. 2, email dated October 12, 2015). Thus, the record reveals that other provisions of the CEA such as the email policy and the confidentiality policy, were believed to be unlawful and were objected to by Firmin prior to the filing of his initial charge, and those additional violations were sufficiently related to the allegations in the initial charge.

However, even assuming the filing of the amended charges occurred precisely as the Respondent believes—namely, that the Board agent investigating the charge informed Firmin of the potential violations with regard to the confidentiality, email, and non-disparagement policies, and provided Firmin with an opportunity to file amended charges specifically alleging those

[7] In this regard, the Respondent has not reported to the General Counsel that the Regional Director or her agents committed any abuse of process by forcing Firmin to, against his will, file the amended charges. (Tr. 50)

potential violations—such conduct has no legal significance under extant Board law. Such investigative procedure has been found by the Board majority in *Leukemia and Lymphoma Society*, 363 NLRB No. 123 (2016), to conform with Section 10062.5 of the NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, and as such, has been found to constitute a sufficient basis to deny a motion to dismiss a complaint for an alleged lack of jurisdiction. Casehandling Manual Section 10062.5 states in relevant part: "Where the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents…must determine whether the charge is sufficient to support complaint allegations covering the apparent unfair labor practices found…. If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge."

Thus, even assuming the investigating Board agent informed Firmin of the potential additional unfair labor practice violations and provided him an opportunity to amend the charge, such conduct is consistent with the Board agent's performance of his or her duties. In fact, bringing such information to the Charging Party's attention is nothing short of the Board's obligation as a public servant. The Board and the courts have consistently found that it is appropriate for Board agents to notify charging parties of deficiencies in their charges or additional merit findings that could be corrected by amendment to incorporate additional violations of the Act. See *Petersen Construction Corp.*, 128 NLRB 969, 972 (1960) (Board found that in the course of investigating the initial charges, the Regional Office discovered evidence of a number of potential respondents, and "it was the duty of the General Counsel, in discharging his responsibilities as a public official charged with enforcing public rights, to take proper measures calculated to effectively remedy all of the unfair labor practices which had been revealed by the investigation.") In *Petersen Construction*, supra, the Board determined that the Regional Office personnel's furnishing the charging party with appropriately drawn charges and instructions to sign them if he wished to do so, "was a legitimate exercise of the General Counsel's duty to bring to the Charging Party's attention matters uncovered during the course of the investigation and in no way interfered with his free choice in determining whether to stand on the original charge or to expand it further by amendment." Id. at 972; See *Marbro Co., Inc.*, 284 NLRB 1303, 1313–1314 (1987) (where Board rejected respondent's argument that a Board agent improperly solicited the inclusion of new allegations in an amended charge); See also *NLRB v. Laborers Local 282*, 567 F.2d 833, 835 (8th Cir. 1977) (where upon investigation of a charge the Board's Regional Office was justified in requesting that the charging party file a charge against a joint venture employer as well as the union).

The Board has held that it is irrelevant "that the initial impetus to remedy the additional unfair labor practice may have originated in [a] Regional Office" as "the Regional Office, and not the Charging Party, conducted the investigation which uncovered the additional matters," and therefore, "this could hardly have occurred in any other sequence." *Petersen Construction*, supra at 973. The Board has also held that where "there is but 'mere speculation' that the Region's employees did anything other than fulfill their duties to take proper measures to prosecute unfair labor practices revealed by an investigation,….the judge appropriately refused to order the Board to produce either the witnesses or documents sought by the Respondent." *Earthgrains Co.*, 351 NLRB 733, 739 (2007).

Finally, the Respondent's assertions pertaining to the alleged lack of jurisdiction are unavailing because the Respondent has failed to establish that the Board acted outside of the situation which gave rise to the original charge. *CSA RX Services, Inc*., 363 NLRB No. 180, slip op. at 1, fn. 3 (2016). In *CSA RX Services*, like the instant case, the respondent argued that the charge was improperly solicited and it therefore should be dismissed. The Board found that argument to be meritless for the reasons stated by the administrative law judge, which included the judge's determination that the Board had not acted "so completely outside the situation giving rise to the (original) charge that it may be said to be initiating the proceeding on its own motion." Id. slip op. 11, citing *NLRB v. Reliance Steel Products Co.*, 322 F.2d 49, 53 (5th Cir. 1963) and *NLRB v. Kohler Company*, 220 F.2d 3, 7 (7th Cir. 1955). In the instant case, the original charge alleged that Respondent violated the Act by maintaining an unlawful rule in its contract (Contract Employee Agreement) concerning "forced arbitration." (GC Exh. 1(a)) The charge also alleged that Firmin was discriminated against based on his "complaints about unlawful provisions of the contract." Id. As the confidentiality, email, and non-disparagement policies are found in that same Contract Employee Agreement which is the subject of the original charge, the amended charges arose from the same situation or contract that gave rise to the original charge. As a result, informing the Charging Party of other potentially unlawful rules or policies in that same Contract Employee Agreement was not so utterly extraneous to the situation pertaining to the original charge that the Board could be viewed as "initiating the proceeding on its own motion." *CSA RX Services*, supra, slip op. at 11; See *Alberici-Fruin-Colnon*, 226 NLRB 1315, 1316 (1976), enfd. 567 F.2d 833 (1977) (charge against employer alleging a discharge in violation of Section 8(a)(3) was not improperly solicited where the original charge against the union alleged an unlawful attempt to cause the employer to discriminate against the charging party in violation of Section 8(b)(2)).

Thus, the evidence fails to establish that the amended charges in the instant case were improperly solicited, nor does it establish that there was any improper conduct by the General Counsel's Regional Office personnel which would affect the validity of the amended charges.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background, Stipulated Facts, and Exhibits

The relevant facts, as set forth below, are derived from the parties' factual stipulations and exhibits admitted into evidence that comprise the official record in this case. At the hearing in this matter, the Respondent and General Counsel offered a Joint Motion and Stipulation of Facts and Exhibits (Jt. Exh. 1), and a Joint Motion and Stipulation of Facts (Jt. Exh. 2) into evidence, which were admitted and received into the record.[8] In addition, GC Exhs. 1, 2, and 4, R. Exhs. 1 and 2, and various other stipulations were received into the record.

[8] The stipulations were made without prejudice to any objection either party may have as to the relevancy of any of the stated facts therein. (Jt. Exh. 1) Neither party chose to call or examine any witnesses at the trial.

The Respondent operates an information technology staffing company in Atlanta, Georgia that identifies candidates whom are referred for employment to its customers. (Jt. Exh. 1). The Respondent identifies candidates for employment in temporary and permanent positions with its customers through various internally developed databases, online services, resume posting websites, as well as other sources. Once the Respondent identifies a candidate, their resume is screened, and if they have the requisite experience and availability for a position with one of Respondent's customers, the Respondent or its customer will interview the candidate. (Jt. Exh. 1) Candidates who successfully pass the interview are provided preemployment documents. If a candidate is seeking a work assignment at a customer's site, one of the pre-employment documents they receive, and must sign as a condition of employment, is Respondent's Contract Employee Agreement. (Jt. Exh. 1) It is undisputed that the Respondent maintains the provisions which are at issue in this matter, and the parties stipulated that from April 2015 to May 16, 2016, applicants for employment with the Respondent who sought work assignments at customer sites were hired by Respondent only if they signed the Contract Employee Agreement.[9] (Jt. Exh. 1; GC Exh.1(i))

From October 1, 2015 to March 31, 2016, the Respondent hired and referred approximately 15,405 employees for work assignments at customer worksites. (Jt. Exh. 1) Those employees remained Respondent's employees even though they worked at the customer's jobsite, and they continued to be bound by the Respondent's Contract Employee Agreement. (Jt. Exh. 1) The Respondent hired and assigned employees to work for approximately 1,200 customers or clients during that last year. (Jt. Exh. 2)

The Respondent's applicants for assignment at customer sites are not routinely advised or invited to request modifications to the Contract Employee Agreement. However, if such employees request changes to the CEA, only a recruiter, account manager, sales manager, or director of operations can modify it. The relevant provisions of the Contract Employee Agreement are not modified according to the identity of the customer. (Jt. Exh. 2) In addition, of the approximately 15,405 applicants hired between October 1, 2015 and March 31, 2016, who signed Contract Employee Agreements, only two requests for modifications were approved by the Respondent. In those two instances, the requested modifications were to the Non-Disparagement Policy wherein it was made mutual to both the Respondent and the applicant. (Jt. Exh. 1) On at least two occasions since October 2015, the Respondent denied requests for modifications to the Arbitration policy. (Jt. Exh. 1; GC Exh. 4; Tr. 49) Although Respondent asserts certain business justifications for its Confidentiality Policy and Email Policy, it does not routinely advise applicants of those justifications. (Jt. Exhs. 1 and 2) Finally, in October 2015, the Charging Party requested a modification to the Contract Employee Agreement, but Respondent denied that request.

[9] While the record contains three versions of the Respondent's Contract Employee Agreement (GC Exh. 2(a)-(c), the version in effect at the time the Charging Party filed his charge was GC Exh. 2(a). Any modifications to the CEA provisions at issue in this matter are not material to this case.

B. The Contentions of the Parties

As mentioned above, the General Counsel alleges that the Respondent's Contract Employee Agreement contains four policies that are overbroad and unlawful which violate Section 8(a)(1) of the Act: (1) Confidentiality and Data Security; (2) E-Mail and Internet Policy; (3) Non-Disparagement; and (4) Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims. The Respondent denies that its maintenance of these four policies violates the Act as alleged.

C. Analysis

1. The legal standard

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Section 7, the cornerstone of the Act, provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

The rights under Section 7 have been found to "necessarily encompass[] the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). This includes employee communications regarding their terms and conditions of employment. *Central Hardware Co. v. NLRB*, 407 U.S. 451, 459 (1972); *Parexel International, LLC*, 356 NLRB 516, 518 (2011). As mentioned above, under Section 7, employees also have the right to engage in activity for their "mutual aid or protection," which also includes communicating regarding their terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, a core activity protected by Section 7 is the right of employees to discuss, debate, and communicate with each other regarding their workplace terms and conditions of employment. Consequently, the Board has held that employees' concerted communications regarding matters affecting their employment with other employees, their employer's customers, or with other third parties such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990). The Board reasoned that prohibitions against employees communicating with others such as third parties "reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection." Id. at 1172; see also *Trinity Protection Services, Inc.*, 357 NLRB 1382, 1383 (2011).

It is well established that an employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7

rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Valley Health System LLC d/b/a Spring Valley Hospital Medical Center*, 363 NLRB No. 178 (2016); *T-Mobile USA, Inc*, 363 NLRB No. 171 (2016); *Triple Play Sports Bar*, 361 NLRB No. 31, slip op. 6 (2014); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 5 (2014). The analytical framework for determining whether maintenance of rules violate the Act is set forth in *Lutheran Heritage Village-Livonia*, supra. Under *Lutheran Heritage*, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7." 343 NLRB at 646 (emphasis in the original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

In this case, the General Counsel does not allege that the policies or rules in question were promulgated in response to union activity, or that they have been discriminatorily applied to restrict the exercise of Section 7 rights. Rather, the General Counsel argues that under the first prong of the test, the challenged rules are overbroad on their face such that employees would reasonably construe the language in the policies at issue to prohibit their Section 7 activities.

In determining whether employees "would reasonably construe the [rule's] language to prohibit Section 7 activity," the Board adheres to certain guidelines in its analysis. The Board will determine that an employer rule is overbroad "when employees would reasonably interpret it to encompass protected activities." *Triple Play Sports Bar & Grille*, supra, slip op. at 7. The Board has found that its "task is to determine how a reasonable employee would interpret the action or statement of her employer, and such a determination appropriately takes account of the surrounding circumstances." *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011). The Board, in analyzing work rules, "must give the rule a reasonable reading…," and "refrain from reading particular phrases in isolation, and… must not presume improper interference with employee rights." Id. at 646. In addition, the Board does not require that an employer actually apply a rule for it to be found unlawful. "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Layayette Park Hotel*, supra; see also *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971) (the mere maintenance of the rule itself inhibits the engagement in otherwise protected organizational activity and is not precluded by the absence of evidence that it was invoked).

An employer's rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, as stated above, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. Furthermore, any ambiguity in the rule must be construed against the drafter of the rule, which in this case is the Respondent. *Flex Frac Logistics*, LLC, 358 NLRB 1131, 1132 (2012), enfd. 746 F.3d 205 (5th Cir. 2014).[10] This principle stems from the Act's goal of preventing employees from being

[10] The Board's decision in *Flex Frac Logistics, LLC*, supra, was subsequently invalidated as a case decided by a panel that included two persons whose appointments to the Board were not valid. See *Noel Canning*, 134 S.Ct. 2550 (2014). The Board has since found however, that reliance on *Flex Frac*

chilled in the exercise of their Section 7 rights, whether or not such an effect on their rights is intended by the employer, instead of being tasked with dispelling such chill once it is manifest. Id.; See, e.g. *Lafayette Park Hotel*, 326 NLRB at 828.

While it is undisputed that the four policies at issue in this case are applicable to applicants for employment who have not yet established their employment relationship with the Respondent, the Board and courts have made it clear that the protection of the Act has been extended to applicants for employment. *Briggs Mfg. Co*., 75 NLRB 569, 571 (1947) (where the Board found that the statutory definition of "employee" was broad enough to cover "applicants for employment"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941) (the Supreme Court held that Section 8(a)(3) applied to job applicants); E.g., *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 88 (1995) (summarizing *Phelps Dodge* as holding that the "statutory word 'employee' includes job applicants"); see also *Toering Electric Co.*, 351 NLRB 225 (2007).

During the operative time period in this case, the Respondent required over 15,000 applicants to forfeit or restrict their rights to share information with employees, applicants and other parties by virtue of its confidentiality, email, non-disparagement, and arbitration policies. While Board law certainly addresses employer efforts to restrict Section 7 rights of employees, such legal precedent is similarly applied to other forms of employer policies and rules applicable to applicants for employment in preemployment agreements, like the Respondent's Contract Employee Agreement at issue in this case. See *Haynes Bldg. Serv., LLC,* 363 NLRB No. 125 (2016) (preemployment agreement mandatory arbitration provision); *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012). As Board law is applicable to preemployment agreements such as the Respondent's Contract Employee Agreement, I must now apply those legal standards to the four policies or rules at issue in this case.

2. The Respondent's Confidentiality and Data Security rule

The Respondent's Contract Employee Agreement contains a rule or provision entitled "Confidentiality and Data Security." That provision states:

> **11. Confidentiality and Data Security**. Contract Employee agrees that all information relating to the business operations of Insight Global or Customer shall be held in strict confidence and not disclosed without the prior written consent of Insight Global or Customer, whichever is appropriate.
>
> Without the prior written approval of Insight Global or Customer, as applicable, Contract Employee will not, at any time (whether during or subsequent to the period of this Agreement), disclose to others, or use Contract Employee's own benefit, confidential information belonging to Insight Global, Customer, or the licensers, licensees, affiliates or customers of Insight Global or

Logistics is appropriate because the panel's decision was enforced by the United States Court of Appeals for the Fifth Circuit prior to the issuance of *Noel Canning*. 746 F.3d 205 (5th Cir. 2014). The Board has also noted that there is no question regarding the validity of the court's judgment. *T-Mobile, USA, Inc.*, 363 NLRB No. 171, slip op. at 2, fn. 5 (2016); See also *UPMC*, 362 NLRB No. 191 fn. 5 (2015).

> Customer including, but not limited to, all information belonging to Insight Global, Customer, or the licensers, licensees, affiliates or customers of Insight Global or Customer related to their respective services and products, customers, business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, personnel information (including, but not limited to, names, educational background prior experience and availability), customer and supplier contacts and needs, sales lists, technology, software, computer programs, computer systems, inventions, developments, and trade secrets of every kind and character, acquired by Contract Employee during the period of, or in connection with, Contract Assignment.
>
> Contract Employee shall comply with all policies and procedures of Insight Global and/or Customer provided or known to Contract Employee regarding data security and privacy and, in any event, use reasonable care to protect the confidential data of Insight Global, Customer or their licensors, licensees, affiliates or customers, including by diligently using passwords, encryption and other security measures made available to Contract Employee, reasonably securing from theft or loss equipment provided to Contract Employee by Insight Global or Customer, and promptly notifying Insight Global in the event of any unauthorized use or disclosure of confidential data when discovered by Contract Employee. (GC Exh. 2(a))

The General Counsel asserts this rule violates the Act because it restricts employees from communicating with other employees and third parties about protected topics if approval is not first obtained from the Respondent or its customer. (R. Br. at p.7) The Respondent denies its maintenance of this rule is unlawful. Instead, it argues that the confidentiality and data security provision protects the confidential information of Respondent's customers, and prevents disclosure of Respondent's trade secrets, including its personnel information and lists, and that employees would not reasonably interpret the policy to restrict their Section 7 rights. (R. Br. at pp. 2 and 7)

While this policy does not expressly prohibit disclosure of topics protected by the Act, it does restrict employees from disclosing to others and third parties, confidential information. The prohibition is actually set forth by the Respondent in two distinct phases. In the opening paragraph of the policy, it sets forth a blanket prohibition that "all information relating to the business operations of [Respondent or its customer]… shall be held in strict confidence and not disclosed without the prior written consent of the [Respondent or customer]." In the second paragraph of the policy, the Respondent sets forth that same prohibition with more precise descriptions of the confidential information restricted from disclosure by employees, for their use as their "own benefit." In that connection, the confidential information prohibited from disclosure includes, but is not limited to, "business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, [and] personnel information (including, but not limited to, names, educational background[,] prior experience, and availability)" The Respondent does not set forth in the policy, nor does it routinely explain to applicants, its justification for this provision. (Jt. Exh. 2)

I find that this policy is unlawfully overbroad on several bases. An employer rule is unlawfully overbroad when employees would reasonably interpret it to encompass protected activities. *Triple Play Sports Bar & Grille*, supra, slip op. at 7. The blanket prohibition on disclosing "all information relating to the business operations [of Respondent or its customer]…without the prior consent of [Respondent or its customer]" is ambiguous and overbroad as it fails to define or limit the impermissible conduct. The Board has routinely found such blanket prohibitions as overbroad and unlawful. *Advance Transportation*, 310 NLRB 920, 925 (1993) (where the Board found a rule prohibiting employees from discussion of "company affairs, activities, personnel, or any phase in operations with unauthorized persons" unlawful on its face); See also *Fremont Mfg. Co*., *Inc.*, 224 NLRB 597, 603–604 (1976), enfd. 558 F.2d 889 (8th Cir. 1977) (a rule prohibiting employees from "making any statement or disclosure regarding company affairs, whether expressed or implied as being official, without proper authorization from the company" is an unlawful restriction on employee rights). Under this ambiguous blanket prohibition in the first paragraph of the policy, employees would reasonably believe or interpret the rule as proscribing any discussions about their terms and conditions of employment, such as wages, hours, and working conditions that the Respondent may deem to be "confidential information."

Furthermore, the prohibition in the second paragraph of the policy stating that "[w]ithout the prior written approval of [Respondent or its customer]" the employee "will not, at any time..., disclose to others, or use for [that employee's] own benefit, confidential information belonging to [Respondent or its customer], but not limited to, all information… related to their respective services and products, customers, business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, personnel information (including, but not limited to, names, educational background prior experience and availability" is similarly overbroad. The policy's ambiguous language and a reading of the policy as a whole, establishes that employees would reasonably understand the policy as prohibiting disclosing or discussing terms and conditions of employment with each other or third parties. The Respondent's specific prohibition on the disclosure of "personnel information" would reasonably be understood by employees to encompass wages, hours, and other terms and conditions of employment. In addition, prohibiting the disclosure of personnel information for the employees' "own benefit" is further evidence that employees would reasonably believe they would be precluded from discussing wages and other important terms and conditions of employment because those topics would clearly be beneficial to them. Critically, there is no provision exempting discussions about wages, hours and other working conditions, and there is nothing in the policy that even arguably suggests that protected communications are excluded from its parameters. As such, the policy is overbroad and unlawful.

The Board has repeatedly held that nondisclosure policies or rules with similar language prohibiting employees from disclosing this type of employee personnel information violates Section 8(a)(1) of the Act. The Board has reasoned that rules with such language are unlawfully overbroad because employees would reasonably believe they were prohibited from discussing or otherwise communicating with others concerning wages and other terms and conditions of employment, which is an activity clearly protected under Section 7 of the Act. In *Quicken Loans, Inc*., 361 NLRB No. 94 (2014), affirming 359 NLRB 1201 (2013), the Board found unlawful a "Proprietary/Confidential Information" rule prohibiting the disclosure of information

defined as: (1) "non-public information relating to or regarding…personnel" and (2) "personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers" and "handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses," noting that the Board has found that rules prohibiting employees from disclosing this type of information about employees violates the Act. 359 NLRB at 1201 fn. 3. Similarly, in *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), enfd. 746 F.3d 205 (5th Cir. 2014), the Board found that an employer's prohibition on "[d]isclosure" of "personnel information and documents" to persons outside the organization was unlawfully overbroad as it would reasonably be understood to include "wages or other terms and conditions of employment with nonemployees." Id. at 1131. In addition, in *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), enfd. in part and reversed in part, 805 F.3d 309 (D.C. Cir. 2015), the Board found that an employer rule prohibiting "[a]ny unauthorized disclosure from an employee's personnel file," was unlawful. See also *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (where the Board found an employer rule unlawful that stated information about "employees is strictly confidential" and defined "personnel records" as confidential).

The Board and courts have likewise found policies containing language similar to the Respondent's restriction on the disclosure of confidential information belonging to Respondent or its customers "related to their respective services and products, customers, business methods, strategies, and practices, internal operations, pricing and billing, and financial data costs," to be unlawfully overbroad. See e.g., *Cintas Corp. v. NLRB*, 482 F.3d 463, 469–470 (D.C. Cir. 2007) (approving the Board's finding that a rule requiring employees to maintain "confidentiality or any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" was unlawfully overbroad), enfg. 344 NLRB 943 (2005); *Advance Transportation*, *Co.*, 310 NLRB 920, 925 (1993) (Board found rule prohibiting employees from discussing "company affairs, activities, personnel, or any phase in operations with unauthorized persons" is unlawful on its face); *Brockton Hospital v. NLRB*, 294 F.3d. 100, 106 (D.C. Cir. 2002) (approving the Board's finding that a rule prohibiting discussions of "[i]nformation concerning patients, associates, or hospital operations…except strictly in connection with hospital business" was unlawfully overbroad), enfg. 333 NLRB 1367 (2001).

In addition, the requirement that employees obtain prior written consent or approval from the Respondent or its customers before disclosing the information mentioned above to others is unlawful. It is well settled that employees have the right to communicate regarding their terms and conditions of employment. *Eastex,* supra. Employees are not required to obtain their employer's permission to engage in such protected activity. A rule imposing such a requirement as a precondition to engaging in protected activity, such as in the instant case, is therefore unlawful. *Whole Foods Market, Inc*., 363 NLRB No. 87, slip op. at 4 fn. 10 (2015); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 422 (2006); *Chromalloy Gas Turbine Corp*., 331 NLRB 858 (2000); *Brunswick Corp.*, 282 NLRB 794, 794–795 (1987).

In support of its argument that its confidentiality policy did not violate the Act, the Respondent relies, inter alia, on case law that is clearly distinguishable from the instant case. One such case the Respondent cites is *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003). In that case, the Board held that a handbook's confidentiality provision that restricted

disclosure of "customer and employee information, including organizational charts and databases," did not violate the Act because employees would not reasonably read the rule as prohibiting the discussion of wages and working conditions among employees or with a union. Id. at 279. That case, however, is distinguishable from the instant case. Although that provision restricted disclosure of "customer and employee information, including organizational charts and databases," that restrictive phrase appeared within the larger provision prohibiting disclosure of "proprietary information, including information assets and intellectual property" and was listed as an example of "intellectual property." Id. The rule in *Mediaone of Greater Florida* stated:

> **Proprietary Information**
>
> You're responsible for the appropriate use and protection of company and third party proprietary information, including *information assets* and *intellectual property*. Information is any form (printed, electronic or inherent knowledge) of company or third party proprietary information. Intellectual property includes, but is not limited to:
>
> -business plans
> -technological research and development
> -product documentation, marketing plans and pricing information
> -copyrighted works such as music, written documents (magazines, trade journals, newspapers, etc.), audiovisual productions, brand names and the legal rights to protect such property (for example, patents, trademarks, copyrights)
> -trade secrets and non-public information
> -customer and employee information, including organizational charts and databases
> -financial information
> -patents, copyrights, trademarks, service marks, trade names and goodwill.
>
> While it's not improper for you to use proprietary information in the general course of doing business, you must safeguard it against loss, damage, misuse, theft, fraud, sale, disclosure or improper disposal. Always store proprietary information in a safe place.
>
> You may not use or access the proprietary information of the company or others for personal purposes or disclose non-public information outside the company. Doing so could hurt the company, competitively or financially…. (Bold and italics in original)

In the instant case, the restrictive phrases are part of a confidentiality and data security provision pertaining in general to "information relating to the business operations" of the Respondent and its customers. The restrictive phrases do not appear within a larger provision prohibiting disclosure of proprietary information, information assets, or intellectual property, nor are they listed as examples of intellectual property. While the provision does list information which could reasonably be characterized as intellectual property that arguably might be rightfully prevented from disclosure, such as "customer and supplier contacts and needs, sales lists,

technology, software, computer programs, computer systems, inventions, developments, and trade secrets…," it also prohibits disclosure of business practices, pricing and billing, financial data, costs, and personnel information, all of which employees would reasonably believe to include wages, hours of work, and other terms and conditions of employment protected by Section 7 of the Act. Unlike the facts in the instant case, the facts of *Mediaone of Greater Florida* revealed that employees, reading the rule as a whole, would reasonably understand that it was designed to protect "the confidentiality of the [r]espondent's proprietary business information rather than to prohibit discussion of employee wages." Id. Respondent's reliance on that case is therefore unpersuasive.

The Respondent also cites *Super K-Mart*, 330, NLRB 263 (1999) in support of its position. In that case, the confidentiality provision barred disclosure of "Company business and documents." Id. The Board majority reasoned that employees would understand that the confidentiality provision was designed to protect the Company's "legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions." Id. *Super K-Mart*, however, is also distinguishable from the instant case, where the Respondent's confidentiality rule precludes disclosure of topics beyond just business documents. Instead, as mentioned above, it prohibits disclosure of personnel information which clearly would be understood to include wages, hours, and other terms and conditions of employment.

The instant case is also distinguishable from *Lafayette Park Hotel*, supra, cited by the Respondent, where a majority of the Board upheld a standard of conduct that prohibited employees from "[d]ivulging Hotel-private information." While the term "Hotel-private" was not defined in the provision, the Board determined that it would not be reasonably read to include employee wage discussions. Id. In the instant case, unlike in *Lafayette Park Hotel*, the policy specifically prohibits "personnel information" which relates to employees' wages and conditions of employment. In fact, as mentioned above, it also prohibits "pricing and billing," "financial data," and "costs," all of which would reasonably be believed to encompass employee wage information. Because of this, the substance of the policy implicates information about employee wages and other working conditions in a manner that the provision in *Layayette Park Hotel* did not.

Finally, in support of its position, the Respondent also relies on *Palms Hotel and Casino*, 344 NLRB 1363, 1388 (2005). The Administrative Law Judge in that case upheld a confidentiality provision prohibiting employees from discussing its "policies and procedures" with "outsiders" or "non-privileged" team members by dismissing the complaint allegation that it violated Section 8(a)(1) of the Act. Id. In that case, however, the Board noted that there were no exceptions to that complaint allegation dismissed by the judge. 344 NLRB at 1363, fn. 1. Since that finding by the judge was never before the Board for its review, and it therefore was never ruled on by the Board, it has no precedential value and the Respondent's reliance on it is misplaced.

In defense of its confidentiality policy, the Respondent offers that the asserted business justification for its policy is to help further its and its customers' security, privacy, and confidentiality needs (Jr. Exh. 2). Specifically, the Respondent argues that it has "a legitimate

business reason for the restriction on disclosure of employee names and other unique personnel information used for placement purposes." (R. Br. p. 23) While I have given Respondent's asserted business justification consideration, I find it is not sufficient to warrant the provision's overbroad language and its potential infringement on the employees' rights protected by Section 7 of the Act. Initially, I note that Respondent argues in its post-hearing brief that the restriction on disclosure of "personnel information" is not overbroad because it "clearly defines 'personnel information' as 'names, educational background, prior experience and availability."[11] That assertion, however, is not supported by the record which establishes the policy is applicable to personnel information "including, *but not limited to*," names, educational background, prior experience and availability (emphasis added). The Respondent also asserts that "[a] reasonable employee would know that this provision is designed to keep *personnel lists* out of the hands of Insight Global's competitors and does not serve as a restriction on …Section 7 rights." (emphasis added) (R. Br. at p. 24) That assertion, however, is also without support in the record because the Respondent's policy is not limited to the disclosure of "personnel lists." However, even assuming that the Respondent's policy was limited to "personnel lists," the Board has found that the prohibition against disclosure of such material is unlawful. See *Quicken Loans, Inc*., 361 NLRB No. 94 (2014), affirming 359 NLRB 1201 (2013) (where the Board found unlawful a confidentiality rule prohibiting the disclosure of information defined as "personnel information including, but not limited to, all personnel lists," noting that prohibiting employees from disclosing that type of information about employees violates the Act. 359 NLRB at 1201 fn. 3).

In addition, while the Respondent may wish to protect certain information from disclosure and illicit use, such interests do not necessitate or justify the inclusion of topics protected by the Act, such as communicating about wages, hours, or other terms and conditions of employment with other employees of third parties, or engaging in other protected concerted or union activities. See *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 fn. 3, 291–292 (1999) (where Board found an employer's asserted business interests failed to justify its broad confidentiality policy that was understood to include topics protected by the Act). This finding is especially true given that Respondent's asserted justifications for the policy appear to be theoretical as the evidence fails to establish any breach or potential breach of the policy. (Tr. 39) Furthermore, there is no evidence that Respondent's customers and their businesses require such a restrictive confidentiality policy, nor is there evidence that a less restrictive policy would be insufficient to protect the customers' interests. Id.; see also *Flex Frac Logistics, LLC.*, 358 NLRB 1131, 1131 (2012) (finding no merit in employer's asserted legitimate business interest in the rule).

Finally, I note that whether the Respondent specifically intended to restrict employees' rights under Section 7 of the Act with its overly broad confidentiality policy is immaterial. The Board has held that its focus in such cases is on whether employees would reasonably construe a policy or rule to restrict their Section 7 rights. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004) (employer rules that are facially neutral violate the Act if "employees would reasonably construe the language to prohibit Section 7 activity."); See also *Flex Frac Logistics, LLC.*, supra at 1131 (finding employer's admission that it did not mean to infringe on employees protected discussions about wages indicates that it never had "a legitimate

[11] R. Br. at p. 23.

business interest in a confidentiality rule that broadly prohibits the discussion of wages or other terms and conditions of employment").

Base on the above, I find that the Respondent's policy is overbroad as employees would reasonably believe or interpret it as proscribing discussions about their terms and conditions of employments, such as wages, hours and working conditions that Respondent may consider as confidential. The fact that the policy fails to contain a provision exempting discussions about wages, hours, and other working conditions also supports finding its restrictive terms overbroad. Thus, the Respondent's maintenance of the provisions discussed above in its confidentiality and data security rule constitute a violation of Section 8(a)(1) of the Act.

3. The Respondent's E-mail and Internet Policy rule

As mentioned above, the Respondent hired and assigned employees to work for approximately 1,200 customers during the last year. (Jt. Exh. 2) The parties stipulated that some of Respondent's employees have access to Respondent's customers' email systems. Pursuant to that access, the Respondent maintains in its Contract Employee Agreement the following email policy which places a blanket prohibition on employees' nonwork use of all the Respondent's customers' email systems:

> **15. E-Mail and Internet Policy**. Contract Employee acknowledges and agrees to adhere to all applicable policies, procedures and rules of both Insight Global and Customer with respect to the use of Insight Global and/or Customer's e-mail and internet systems. Contract Employee acknowledges that Customer's e-mail and internet systems are to be used solely for the purposes of completing the Contract Assignment. In addition, Contract Employee agrees that the use of Customers systems to transmit, download, or distribute offensive materials, language, profanity, offensive images, or any other inappropriate material is prohibited. Contract Employee is expressly prohibited from using any of Contract Employee's personal computer resources, including, without limitation, Contract Employee's personal internet, e-mail and instant messaging accounts, to perform the Contract Assignment, without Customer's prior express written authorization. Contract Employee agrees that Customer may inspect, at any time, the entire contents of any electronic data storage device or any e-mail or instant messaging account used to perform the Contract Assignment. Contract Employee acknowledges that Customer may monitor, track and, in some instances, ascertain the identity of the authors, recipients, and contents of computer-based communications by Contract Employee, and Contract Employee knowingly and voluntarily consents to being monitored and to having his/her communications reviewed by Customer. Contract Employee is aware that he/she has no individual rights to the contents or use of Customer's computer resources, and all data on or material created using Customer's computer resources is Customer's property. Contract Employee further acknowledges that he/she has no expectation of privacy for any Internet or other use via Customer-owned or -provided connections or while using Customer's computer resources. Any breach of the E-Mail and Internet Policy section of this agreement will be grounds for immediate

> termination, and Contract Employee will be liable for any and all suits and claims arising out of any breach of this section. (GC Exh. 2(a))

The General Counsel specifically alleges that the policy is unlawful in that it provides: "Contract Employee acknowledges that Customer's e-mail and internet systems are to be used solely for the purposes of completing the Contract Assignment. In addition, Contract Employee agrees that the use of Customers systems to transmit, download, or distribute offensive materials, language, profanity, offensive images, or any other inappropriate material is prohibited" and that the "Contract Employee is aware that he/she has no individual rights to the contents or use of Customer's computer resources."

In *Purple Communications, Inc*., 361 NLRB No. 126 (2014), the Board held that employee "use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." Id. slip op. at 1. The Board noted that employers do not have to provide such access to employees, but if they chose to do so the employer can only implement a total ban on nonwork use of email if the employer is able to demonstrate "special circumstances [that] make the ban necessary to maintain production or discipline." Id. Specifically, the employer must show:

> …the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice. And, ordinarily, an employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer has authorized. Id. slip op. at 14.

If the Respondent's email policy contained a similar restriction on employees' use of Respondent's own email system or if Respondent's customers maintained such a policy themselves, such restrictions would arguably constitute violations of the Act under the principles of *Purple Communications*. However, in this case, the Board's holding in *Purple Communications* is not directly on point because the Respondent's policy restricts only the use of third party email systems. There are no Board cases that directly address the issue of whether an employer can limit employee use of third party email systems. However, the General Counsel submits that the Board's holding in *Purple Communications* should be applied to the instant case. The Respondent, on the other hand, argues that *Purple Communications* should not apply to this case because the policy restricts employee's use of email and internet of its customers, and does not apply to use of the Respondent's own email systems.[12]

The Respondent further asserts that its business justification for this policy is to: (1) protect the security of the customer's computer systems, (2) prevent unauthorized access, disclosure, or use of the private or confidential data stored on the customer's computers, (3) protect the intellectual property of the customer from disclosure, loss, or theft, and (4) prevent unlawful harassment and discrimination in the customer's workplace. (Jt. Exh. 2, para. 1; R. Br.

[12] The Respondent does not have a policy which restricts employee use of its email system. (Jt. Exh. 2).

at pp. 7–8). The Respondent argues that the policy does not violate the Act because employees have no Section 7 right to access and use of the email of a third party, and that the policy restricts employee use of customer email, not the Respondent's email, and therefore the Board's decision in *Purple Communications* should not apply. Moreover, the Respondent argues that even if *Purple Communications* does apply, the Respondent has met its burden of showing that the restriction on employee use of customer emails meets the special circumstances test outlined in that case. (R. Br. at p. 2) Furthermore, the Respondent argues that even if the Board finds that employees have a Section 7 right to utilize a customer's email and internet, the policy's restriction on using the system to "transmit, download or distribute offensive materials, language, profanity, offensive images or any other inappropriate material" is not unlawful because the restriction is sufficiently narrow. (R. Br. 19)

The Board recognized in *Purple Communications* that email is a form of speech and communication used by employees in the workplace, noting that "[t]here is little dispute that email has become a critical means of communication, about both work-related and other issues, in a wide range of employment settings." 361 NRLB slip op. at 6. The Board also acknowledged that "e-mail has, of course, had a substantial impact on how people communicate, both at and away from the workplace." Id; citing *Register Guard*, 351 NLRB 1110, 1116 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). I find that the Board's decision in *Purple Communications* is applicable to the instant case. In addition, in applying the standard articulated in *Purple Communications* and its rationale, I find the Respondent's restriction of employees' email use when those employees have general access to the customers' email system, infringes on their Section 7 rights and is unlawful in violation of Section 8(a)(1) of the Act. When the Board's principles concerning employee email use are taken into consideration, it is clear that employees' Section 7 rights are being infringed upon by the Respondent. The fact that Respondent is maintaining and enforcing a policy restricting communications by its employees, which could include communications protected by the Act, in a system of communication the employees have access to and use in the course of their employment with Respondent, is unlawful. The fact that the Respondent is restricting its employees' use of third party email systems, as opposed to its own email system, is in essence, inconsequential. As the General Counsel has correctly pointed out, "[t]o find otherwise would excuse Respondent's unlawful policy and leave the employees negatively affected by the Policy without recourse." (GC Br. at p. 13)

To find merit in the Respondent's argument would essentially mean that its employees are excluded from the protection of the Act simply because they are performing work for the Respondent's customers and are using the customer's email system. Such a finding would be theoretically opposed to the Board's findings in cases where employment relationships and protections under the Act have been examined. In one such case, *New York New York Hotel & Casino*, 356 NLRB 907, 912 (2011), the Board held that employees of a contractor who work regularly on another employer's property should not be accorded diminished rights under the Act based merely on the location of their workplace. In that case, the Board held that "linking full Section 7 rights to the existence of a particular employment relationship might create an incentive for businesses to structure their relationships with each other and thus with workers so as to restrict workers' statutory rights, in contravention of the declared congressional policy of 'protecting the exercise by workers of full freedom of association [and] self-organization.'" Id.

On this issue, the Board stated for example that employees who are employed to "work regularly in an office building not owned by their employer should not be denied Section 7 rights on the sole ground that they work on the property of an employer other than their own." Id. In addition, the Board explained that "the National Labor Relations Act expressly does not require that employees be employed by a particular employer in order to confer rights on the employees" Id.

In addition, in the instant case the Respondent has restricted its employees' access to third party channels of communication used by its employees when they are working for those third parties, but where it has no property interest. As such, the Respondent is "plac[ing] itself within the orbit of the Board's corrective jurisdiction." *Fabric Services*, 190 NLRB 540, 542 (1971), quoting *NLRB v. Gluck Brewing Co.*, 144 F.2d 847, 855 (8th Cir. 1944). In fact, since the Respondent has no property rights to its customers' email systems, it cannot lawfully impose restrictions on its use. See, e.g., *Ambrose Electric*, 330 NLRB 78, 79–80 (1999) (where Board found it unlawful to restrict a union official's access to a jobsite shared by both union and nonunion employees and where the contractor did not own or control the jobsite). As such, the Respondent's employees have a presumptive right to use the Respondent's customers' email system to engage in Section 7 protected communications during nonworking time.

As mentioned above, the Respondent's policy requires that employees agree "that the use of Customers systems to transmit, download, or distribute offensive materials, language, profanity, offensive images, or any other inappropriate material is prohibited." This policy refers to emails as well as other forms of electronic communication systems. In analyzing this policy under the Board's rationale in *Purple Communications*, I find its requirement that employees agree "that the use of Customers systems to transmit, download, or distribute offensive materials, language, …offensive images, or any other inappropriate material is prohibited" is ambiguous and unlawfully overbroad.[13] It is well established that employees have the right under Section 7 of the Act to engage in activity for their "mutual aid or protection," which includes communicating regarding their terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, employees have the right to discuss, debate, and communicate with each other regarding their workplace terms and conditions of employment and other protected topics. It is recognized that sometimes in the workplace these communications can become contentious, but that type of speech does not lose the protection of the Act even if it includes "intemperate, abusive, and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). The Board has held that broad prohibitions on offensive language, without context or examples, are overly broad. *NCR Corp*., 313 NLRB 574, 577 (1993) (affirming Administrative Law Judge's finding that an employer's rule against bulletin board posting containing "offensive language" is overly broad); *UPMC*, 362 NLRB No. 191, slip op. at 2, fn. 5 (2015) (Board found an employer's email policy unlawful based on its ambiguity). In addition, a policy or rule prohibiting unprotected behavior may still constitute a violation of the Act if it also includes language that is overly broad and could be understood as prohibiting protected conduct. See *Flamingo Hilton-Laughlin*, 330 NRLB 287, 288 fn. 4, 294 (1999) (rule prohibiting unprotected conduct unlawful because it also prohibits statements that are "merely false," which could be understood to include union propaganda).

[13] The Board has specifically held that a rule prohibiting profane language is not unlawful on its face. *Lutheran Heritage Village-Livonia*, supra.

The instant policy states that "offensive" materials, language, and images, as well as "any other inappropriate material" are prohibited. The policy is ambiguous and fails to define or describe "offensive" or "inappropriate" materials, language, or images. It also does not contain any examples to illustrate exactly what is prohibited, and the language used is general enough that it would be reasonably interpreted to include protected statements or acts. *Three D, LLC,* 361 NLRB No. 31 (2014); *UPMC*, 362 NLRB No. 191, slip op. at 2, fn. 5 (2015). As the Board explained in *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4, fn. 11 (2015), "[w]here reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity." Critically, I also note that there is no language in the policy that exempts statements, matters, or images that are protected by the Act. As such, I find that employees would likely refrain from protected communications due to a reasonable concern that their statements or actions could be viewed as running afoul of the policy.

In *Valley Health Systems LLC*, 363 NLRB No. 178, slip op. at 1–2 (2016), the Board found that a rule prohibiting "offensive" conduct to coworkers was unlawfully overbroad. In that case, the Board reasoned that the "broad prohibition" "[did] not appear among a list of serious forms of objectively clear misconduct that would help employees understand its contours," and it was not "accompanied by any other descriptive language that would help employee interpret what types of 'offensive' conduct the rule [was] targeting." Id. In addition, in *First Transit Inc*., 360 NLRB No. 72, slip op. at 2–3 (2014), the Board found that an employer rule prohibiting "inappropriate attitude or behavior" was sufficiently imprecise and unlawfully overbroad. In the instant case, the use of "offensive" and "inappropriate" are sufficiently imprecise and employees would reasonably understand those terms to encompass statements or actions protected by Section 7 of the Act, and the policy's prohibitions are therefore unlawfully overbroad.

Under *Purple Communications*, supra, having determined that the Respondent's employees have a presumptive right to use the customers' email systems to engage in protected communications during nonworking time, and that the policy infringes on its employees' Section 7 rights, the Respondent may rebut that presumption by demonstrating special circumstances necessary to maintain production or discipline that justify restricting its employees' rights. 361 NLRB slip op. at 14. For the reasons set forth below, I find that the Respondent has failed to rebut that presumption.

The Respondent asserts its business justification for this policy is to protect the security of the customer's computer systems by preventing unauthorized access, disclosure, or use of the private or confidential data stored on the customer's computers, and to protect the intellectual property of the customer from disclosure, loss, or theft. The parties have stipulated that the email policy helps Respondent meet the security, privacy, and confidentiality needs of its customers (Jt. Exh. 2) However, the Respondent's concerns are theoretical and there is no evidence that employees have ever breached the policy or that consequences from a breach of the policy have occurred. (Tr. 39) In *Purple Communications,* the Board held that "[t]he mere assertion of an interest that could theoretically support a restriction will not suffice." Id. The record is devoid of evidence establishing that the policy outweighs the infringement on the employees' Section 7 rights. There is also no evidence that the customers are incapable of

securing their computer data and intellectual property, or that the approximately 1200 customers that Respondent had in the last year would all have the same security concerns or that they would all require such a broad policy to address those concerns.

The Respondent also asserts that another business justification is to prevent unlawful harassment and discrimination in the customer's workplace. The Respondent's policy, however, does not articulate or describe what that harassment or discrimination is, and instead it has implemented a vague and broadly reaching prohibition applicable to all non-work related emails. The Respondent's policy also fails to make any attempt at excluding protected actions or speech from the policy. The record also establishes that, like its asserted security justification, there is no evidence demonstrating that the harassment and discrimination provision has been breached or that it is a problem in the workplace that justifies being addressed by such a broad restriction on non-work use of emails.

Based on the above, I find that the Respondent's maintenance of the Email Policy constitutes a violation of Section 8(a)(1) of the Act.

4. The Respondent's Non-Disparagement rule

The Respondent's Contract Employee Agreement contains a rule or provision entitled "Non-Disparagement." That provision states:

> **18. Non-Disparagement**. Contract Employee agrees that during his/her employment with Insight Global, Contract Employee will abide by all Insight Global and Customer policies regarding employee communications. Following the termination of Contract Employee's employment for any reason, Contract Employee further agrees that he/she will not make any derogatory or disparaging statement about Insight Global, Customer, or any of their products or services, employees, consultants, officers, directors, or shareholders, or any of them, nor directly or indirectly take any action which is intended to embarrass any of them. (GC Exh. 2(a))

While Respondent's policy prohibits employees whose employment with Respondent has ended from making "derogatory or disparaging statement[s] about [the Respondent, its customers] or… employees, consultants, officers, directors, or shareholders, or… directly or indirectly take any action which is intended to embarrass any of them," it does not define or identify the conduct that would be prohibited as "derogatory," "disparaging," or "embarrassing."

The General Counsel contends that under this policy, the Respondent's prohibition against former employees making "derogatory or disparaging statements" about the Respondent or its customers, or "any action which is intended to embarrass them" both constitute violations of Section 8(a)(1) of the Act. The Respondent, on the other hand, argues that its non-disparagement clause protects it from disparaging statements after an employee has left their employment with the company. (R. Br. at p. 3) The Respondent asserts that a restriction on postemployment statements does not invoke Section 7 protection because those individuals are no longer employees subject to the protection of the Act. The Respondent further argues that

even if such individuals have statutory protection for postemployment statements, the provision is lawful because a reasonable employee would not construe the provision was restricting Section 7 rights. (R. Br. at p. 24–25)

I find that Respondent's "Non-Disparagement" policy prohibiting derogatory or disparaging statements about Respondent, its customers, managers, or employees, etc., is clearly overbroad and unlawful as those restricted individuals would reasonably interpret it to preclude statements protected under Section 7 of the Act. The prohibition against "derogatory or disparaging statements" is vague and ambiguous, and there is nothing in the policy that states or even arguably suggests that protected communications are excluded from the parameters of this policy. The Board has long held that it is unlawful for an employer to prohibit employees from making derogatory or disparaging statements, which could include truthful statements about the employer's business practices or management team, or statements protected by Section 7 or the Act. In *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 2 (2016), the Board found unlawful a rule that prohibits "negative or disparaging comments about the …professional capabilities or an employee or physician to employees, physicians, patients, or visitors." The Board determined the rule was unlawful because it would "reasonably be construed to prohibit expressions of concerns over working conditions" Id. In *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the employer maintained a rule prohibiting making "false, vicious, profane or malicious statements toward or concerning [the hotel] or any of its employees." The Board, relying on *Cincinnati Suburban Press*, *Inc.*, 289 NLRB 966, 975 (1988), and *American Cast Iron Pipe Co*., 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), held that the rule reasonably tended to chill employees exercise of Section 7 rights. Id. at 836. In addition, in *Quicken Loans, Inc*., 361 NLRB No. 94 (2014), affirming 359 NLRB 1201 (2013), the Board found an employer "Non-disparagement" provision in an employment agreement which provided employees will not "publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image" was overbroad and unlawful. See *South Maryland Hospital Center*, 293 NLRB 1209 (1989), enfd. 916 F.2d 932, 940 (4th Cir. 1990) (rule prohibiting derogatory attacks on "fellow employees, patient, physicians or hospital representatives" violates the Act as this could prohibit even the most basic forms of union propaganda).

I also find the prohibition of any actions intended to "embarrass" the Respondent, its customers, managers, or employees, etc., is also overbroad and unlawful. While the policy fails to define, identify, or provide examples of conduct that would be intended to embarrass the company or its officials, one can presume that such statements or actions, like those described as "derogatory or disparaging," could safely be described or classified as "negative" toward the Respondent. The Board has found that rules prohibiting "negative" speech or behavior are unlawful. For example, in *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014), the Board found a rule prohibiting "negative comments about fellow team members" and "negativity" to be overly broad and unlawful. In addition, in *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011), the Board found a rule that prohibited "any type of negative energy or attitudes" to be unlawful. See *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (a rule prohibiting "[n]egative conversations about associates [employees] and/or managers" found unlawful); See also *Beverly Health & Rehabilitation Services, Inc.*, 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir.

2002) (unlawful rule prohibited "[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates"). On the other hand, the Board has found rules to be lawful when they address conduct that is reasonably associated with actions that fall outside the protection of the Act, such as conduct that is abusive, malicious, injurious, threatening, intimidating, coercing, profane, or unlawful. See e.g. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647–649 (rule addressing "verbal abuse," "abusive or profane language," and "harassment"); *Palms Hotel and Casino*, 344 NLRB 1363, 1367–1368 (2005) (rule addressing "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees).

In the instant case, as mentioned above, action intended to "embarrass" is broad and ambiguous, and the provision does not contain any defining or explanatory language pertaining to that term. The fact that the policy does not contain any explanation of the offending action or contain lists or examples of what "embarrassing" conduct would consist of to assist employees in understanding its contours, supports finding this rule overly broad. *Valley Health Systems, LLC*, 363 NLRB No. 178, slip op. at 2 (2016) (the Board found a prohibition against "offensive" conduct that did not "appear among a list of serious forms of objectively clear misconduct that would help employees understand its contours," to be overly broad and unlawful). The Board has found that employees "should not have to decide at their own peril what [conduct] is …subject to such a prohibition." Id.; citing *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), enfd. in part and reversed in part, 805 F.3d 309 (D.C. Cir. 2015). However, this is exactly the situation the Respondent's policy places its employees in, just as it does with its prohibition of "derogatory or disparaging statements."

There is also no restrictive language that excludes the rule's application to protected communications or actions. In such instances, the ambiguity must be construed against the Respondent. *Lafayette Park Hotel*, 326 NLRB 824 at fn. 1. Therefore, employees would reasonably interpret the policy as proscribing them from making statements or engaging in activities that may be critical of the Respondent concerning their working conditions or desire to engage in union or protected concerted activities under the protection of Section 7 of the Act, but which the Respondent may view as "embarrassing." See, *First Transit, Inc*., 360 NLRB No. 72, slip op. at 3 (2014) (finding a rule prohibiting "inappropriate attitude or behavior…to other employees" unlawful due to its "patent ambiguity"); See also *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (2014) (where Board found a rule prohibiting "insubordination or other disrespectful conduct" unlawful as phrase "disrespectful conduct" is so ambiguous that employees would reasonably read the rule as encompassing Section 7 activity).[14]

[14] Specifically with regard to the prohibition from engaging in conduct that is "intended to embarrass" the Respondent, its customers, managers, officers or employees, etc., the General Counsel cites *Costco Wholesale Corp.*, 358 NLRB 1100, 1100–1101 (2012), where the Board found a policy prohibiting employees from making statements that "damage the Company, defame any individual or damage a person's reputation" to be unlawful because the rule had no "accompanying language that would tend to restrict its application" to legitimate business concerns. This decision, however, was subsequently invalidated by the Supreme Court's decision in *NLRB v. Noel Canning, a Division of the Noel Corp.*, 134 S.Ct. 2550 (2014), so it has no precedential value, and I do not rely on it to support my findings.

Finally, I find that it is not dispositive that the non-disparagement policy, which must be signed by all applicants prior to the start of their employment relationship with the Respondent, only applies to employees after their employment relationships have ended. It is well established that the Board has recognized former employees enjoy the protections of the Act despite the lack of a continuing employment relationship with their employer. In *Briggs Mfg. Co*., 75 NLRB 569, 571 (1947), the Board found that the statutory definition of "employee" was broad enough to cover "former employees of a particular employer." See also *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), and *Town & Country Electric*, *Inc.*, 309 NLRB 1250, 1255 (1992), enfd. 106 F.3d 816 (8th Cir. 1997). More recently, in *Quicken Loans*, 359 NLRB 1201, 1204 (2013), affirmed and incorporated in 361 NLRB No. 94 (2014), the Board reviewed provisions in an employment agreement that the employer was enforcing against an employee who had voluntarily resigned her employment with the company. In that case, the Board, in reviewing the rules and finding them unlawful, did not distinguish between the rules that were enforceable before and/or after the employment relationship ended. Id.; See also *Frye Electric, Inc*., 352 NLRB 345, 357 (2008) (where an employer unlawfully interrogated a former employee); *Redwood Empire*, *Inc.*, 296 NLRB 369, 391 (1989) (where an employer's statements to a former employee constituted a violation of Section 8(a)(1) of the Act, the Board affirmed the judge's finding that the former employee was "still an 'employee' as that term is defined in a broader sense in Section 2(3) of the Act," and that even though he was not an employee of that particular respondent at the time the statement was made, he "still had the protection of the Act as being a person who met the definition of an employee in Section 2(3) of the Act.) Thus, the Respondent's assertion that a restriction on postemployment statements does not invoke Section 7 protection because those individuals are no longer employees subject to the protection of the Act, is not supported by well-established case law and it is therefore unavailing.

Accordingly, I find that the Respondent's "Non-Disparagement" policy is overly broad and unlawful, and that its maintenance constitutes a violation of Section 8(a)(1) of the Act.

5. The Respondent's Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims rule

The Respondent's Contract Employee Agreement contains a rule or provision entitled "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims." That provision states:

> **21. Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims.** Except as set forth in the final paragraph of this Section 21, in the event of any dispute or claim arising out of or relating to Contract Employee's application for employment with Insight Global, Contract Employee's employment with Insight Global, the termination of Contract Employee's employment, or otherwise relating to this Agreement (collectively, "Disputes"), Contract Employee and Insight Global agree that all such Disputes shall be fully, finally and exclusively resolved by confidential, binding, individual arbitration before the American Arbitration Association ("AAA").
>
> Contract Employee and Insight Global agree that a confidential arbitration is the sole and exclusive forum for resolution of any and all Disputes and hereby

mutually waive their right to trial before a judge or jury in federal or state court in favor of arbitration under this Agreement. Any arbitration shall be governed by the terms herein and the AAA Employment Arbitration Rules and Mediation Procedures ("Rules") then in effect, except as modified herein, but shall not be subject to the AAA Supplementary Rules for Class Arbitrations. In the event of a conflict between the Rules and this Section 21, the terms of this Section 21 shall govern. The arbitration shall proceed before a single arbitrator who is a member of the AAA Panel of Employment Arbitrators and is an attorney licensed and in good standing in the state where Contract Employee last performed services for Insight Global, with not less than fifteen years' experience practicing employment law. Contract Employee and Insight Global hereby agree that all Disputes must be brought solely on an individual basis; neither Insight Global nor Contract Employee may submit a class, collective, or representative action for arbitration under this Arbitration Provision ("Class Action Waiver"). To the maximum extent permitted by law, and except where expressly prohibited by law, arbitration on an individual basis pursuant to this Arbitration Provision is the exclusive remedy for any Disputes that might otherwise be brought on a class, collective, or representative action basis.

BY SIGNING THIS AGREEMENT, CONTRACT EMPLOYEE AND INSIGHT GLOBAL EACH IRREVOCABLY WAIVES HIS/HER/ITS RIGHT TO A JURY TRIAL AND HIS/HER/ITS RIGHT TO PARTICIPATE IN A CLASS OR REPRESENTATIVE ACTION BECAUSE ALL CLAIMS WILL BE RESOLVED EXCLUSIVELY THROUGH INDIVIDUAL ARBITRATION. CONTRACT EMPLOYEE AND INSIGHT GLOBAL AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN HIS/HER/ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.

While Contract Employee and Insight Global agree that an arbitrator shall resolve any Dispute in individual, binding arbitration, an arbitrator shall not have the authority to determine the scope, enforceability, revocability, or validity of this Arbitration Provision or any portion thereof (e.g., the Class Action Waiver); nor shall an arbitrator have the authority to determine whether a given Dispute is subject to arbitration. Rather, Contract Employee and Insight Global agree that such issues may only be resolved by a civil court of competent jurisdiction.

This provisions set forth above shall not be construed to prevent you from filing a charge or a claim with the National Labor Relations Board, the U.S. Department of Labor, the Equal Employment Opportunity Commission, or any similar state agencies if applicable law allows you to do so. Nothing in this agreement shall be deemed to preclude or excuse you or Insight Global from bringing an administrative claim before any agency in order to fulfill an obligation to exhaust administrative remedies before making a claim in arbitration. The provisions of this Section 21 also do not cover: (1) claims for workers compensation, (2) state disability or unemployment insurance benefits, (3) any criminal complaint or proceeding filed by a governmental agency, (4) claims for restitution or civil penalties owed by an employee for an act for which

> the Company sought criminal prosecution, (5) claims for benefits under any employee benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance, or (6) disputes that may not be subject to pre-dispute arbitration agreement as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111.203), or by any other applicable law. (GC Exh. 2(a))

The Respondent requires as a condition of employment that employees sign its Contract Employee Agreement which includes this arbitration policy that expressly and repeatedly precludes employees from filing joint, class, or collective claims addressing their wages, hours, or other terms and conditions of employment. The General Counsel argues that the Respondent's policy violates the Act under existing Board law.

As mentioned above, when evaluating whether a rule, including an arbitration agreement, violates Section 8(a)(1) of the Act, the Board applies the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

Because the Respondent's arbitration provision explicitly prohibits employees from pursing employment-related claims on a class or collective basis, I find it violates Section 8(a)(1) of the Act. The right to pursue concerted legal action, including class complaints, addressing wages, hours, and working conditions falls within the protection of Section 7. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed its earlier decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), which held that an employer violates the Act "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against their employer in any forum, arbitral or judicial." Id. at 2277. Such agreements improperly interfere with the substantive rights of employees, under Section 7 of the Act, to engage in collective action to improve working conditions. The Board has clearly held that the "right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA," and because the Act does not conflict with the Federal Arbitration Act (FAA), a ban on an employee's right to pursue class actions interferes with the employee's rights under Section 7 of the Act. Id. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (Section 7 protects employee efforts seeking "to improve working conditions through resort to administrative and judicial forums"). Accordingly, an employer rule or policy that interferes with such actions violates Section 8(a)(1). *D. R. Horton*, supra; *Murphy Oil*, supra; See also, e.g., *Chesapeake Energy Corp*., 362 NLRB No. 80 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015); *Leslie's Pool Mart, Inc*., 362 NLRB No. 184 (2015).

The Respondent argues that the Board's interpretation in *D. R. Horton* and *Murphy Oil* fails to comply with the Federal Arbitration Act (FAA). The Board has repeated rejected this argument, as articulated in the cases cited above, among others.[15] The Respondent also contends that its arbitration clause is lawful because employees would understand the provision to permit the filing of charges or claims with administrative agencies, in particular with the NLRB. In this connection, the Respondent points out that the provision specifically states it shall not be construed to prevent employees from "filing a charge or a claim with the National Labor Relations Board….[and other agencies] if applicable law allows you to do so." I find, however, that the Respondent's provision is unlawful despite its inclusion of such a "savings clause," excepting NLRB charges or claims from its mandatory arbitration provision. The Board has found that such clauses are insufficient to protect otherwise unlawful policies or rules.

In the instant case, the policy allows employees to file claims with the NLRB or other agencies "if applicable law allows you to do so," but it fails to provide any further explanation. In *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 1 (2015), the Board addressed the issue of whether an employer's arbitration policy that forecloses access to court and requires employees to individually arbitrate employment-related claims is lawful—notwithstanding the Board's holding in *D. R. Horton*—because the policy permits employees to file claims with administrative agencies, which may then choose to pursue a judicial remedy on behalf of employees as a group. Id. In that case, the Board determined that "access to administrative agencies is not the equivalent of access to a judicial forum where employees themselves may seek to litigate their claims on a joint, class, or collective basis." Id. Thus, the Board held that "the exception in the Agreements that permits the filing of claims or charges with administrative agencies does not satisfy the requirement of an alternative judicial forum for the pursuit of joint, class, or collective claims." Id. slip op. at 2. As such, the Respondent's arbitration policy in the instant case compelling employees to individually arbitrate their employment related claims, even with the exception that it does not preclude filing claims with administrative agencies such as the Board, fails to provide employees with a forum to pursue joint, class, or collective claims, and it is therefore unlawful and a violation of Section 8(a)(1) of the Act. Id. slip op. at 4; *RPM Pizza, LLC,* 363 NLRB No. 82, slip op. 1, fn. 3 (2015).

In addition, I find that the Respondent violated Section 8(a)(1) by maintaining its arbitration policy that prohibits the filing of NLRB charges in that it requires all disputes to be resolved by private arbitration. This finding is warranted even though the policy states that it shall not be construed to prevent the filing of NLRB or other administrative agency charges, "if applicable law allows you to do so." In *Solarcity Corp.*, the Board also addressed this issue. In that case, the employer's agreement broadly required all disputes to be resolved by an arbitrator, but the employer argued that no violation could be found because the agreement allowed charges with the NLRB and administrative agencies. Id. slip op. at 4. That agreement, however, allowed such NLRB charges "only if, and to the extent, applicable law permits." Id., slip op. at 4. In that case, the Board analyzed the legal issue under the *Lutheran Heritage* test to determine whether a reasonable employee would construe the agreement as prohibiting the filing of Board charges, thereby raising the prospect that the employee would be chilled from doing so. Id. Noting that

[15] The Board has also addressed fully the relationship between the FAA and both the National Labor Relations Act and the Norris-LaGuardia Act.

preserving and protecting access to the Board is a fundamental goal of the Act (as reflected in Section 8(a)(4), which makes it unlawful to discharge or discriminate against employees for coming to the Board), the Board recognized that rank-and-file employees lack the legal expertise necessary to analyze the employer's rules and determine the "precise nature of the rights supposedly preserved" by the savings clause which purports to except, or "save," employees' legal rights from restrictions on their conduct. Id. slip op. at 5. Board decisions have indicated this is so even where the exceptions refer to NLRB charges. Id.; *Jurys Boston Hotel*, 356 NLRB 927, 943 (2011). In *Solarcity Corp.*, the Board held that the rationale underlying these decisions is that "absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights." Id. slip op. at 5. In that case, the Board found the agreements at issue were vague even with the provisions stating the agreements did not extend to the filing of Board charges. Id.

In applying this well-established Board law, the arbitration provision in the instant case is also unlawful because it is ambiguous, vague, and somewhat contradictory. It repeatedly states that employees have to individually arbitrate any employment dispute they have with Respondent, and that they are prohibited from "class, collective, or representative actions," thereby conveying to employees that, as a condition of employment, they must forfeit their substantive Section 7 right to act in a collective manner in pursuing an employment dispute or claim in any other forum. This explicit unlawful restriction is not nullified or neutralized by the later provision stating that the filing of charges with administrative agencies is permitted because the contradictory language only serves to create confusion over whether an employee understands the filing of charges are permitted. Noting that Board law is well settled that ambiguous work rules or policies that would reasonably be read by employees to have a coercive meaning are construed against the employer, I find that under the arbitration provision in this case, employees would reasonably construe the language to adversely affect their right to file charges with the Board. See *Solarcity Corp.*, slip op. at 6. See also *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), enfd. in part and reversed in part, 805 F.3d 309 (D.C. Cir. 2015) (prohibition on unauthorized disclosure of information from an "employee's personal file" unlawfully ambiguous because it could be read to prohibit protected discussion of wages and other employment terms, and "employees should not have to decide at their peril what information is not lawfully subject to such a prohibition").

Finally, the Respondent notes that the Fifth Circuit Court of Appeals has overruled the Board's decisions in both *D. R. Horton* and *Murphy Oil*, holding that those arbitration and class action waiver agreements were found lawful because there was no substantive right under the Act for employees to pursue legal claims through class actions. Id. at 357. The Respondent argues that under circuit court precedent, in particular the Fifth Circuit precedent, its arbitration provision should be found enforceable and the complaint allegation should be dismissed. The Respondent further asserts, as mentioned above, that consistent with Circuit Court precedent, the rights afforded employees under the Act do not override the FAA. On that basis, Respondent asserts that I should decline to apply the Board's reasoning in *D.R. Horton* and *Murphy Oil*, and issue a decision consistent with the Fifth Circuit Court's ruling in those cases. In finding that this arbitration provision violates the Act under well-established Board law, contrary to the findings of the Fifth Circuit and other Circuit Courts of Appeal, I note that I am bound to follow

Board law unless the Supreme Court dictates otherwise. *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993); See *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984) (where the Board held "[w]e emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied."); See also *Iowa Beef Packers*, *Inc.*, 144 NLRB 615, 616 (1963) ("it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed"). Thus, any arguments regarding the legal integrity of Board precedent are properly addressed to the Board.

Accordingly, I find that the Respondent's maintenance of its arbitration provision violates Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent, Insight Global, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by the following acts and conduct:

(a.) Maintaining or enforcing a policy, provision, or rule in its Contract Employee Agreement under the heading "Confidentiality and Data Security" that prohibits disclosure of all information relating to the business operations of the Respondent or its customer without the prior written consent of the Respondent or its customer; and prohibits disclosure by employees, or use for their own benefit, confidential information belonging to Respondent or its customer related to their respective business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, and personnel information (including, but not limited to, names, educational background, prior experiences, and availability).

(b.) Maintaining or enforcing a policy, provision, or rule in its Contract Employee Agreement under the heading "E-Mail and Internet Policy" that limits employee use of Respondent's customer's email and internet systems solely for the purposes of completing the contract assignment, and prohibits use of the customer's systems to transmit, download, or distribute offensive materials, language, offensive images, or any other inappropriate material, and provides that the employee has no individual rights to the contents or use of the customer's computer resources.

(c.) Maintaining or enforcing a policy, provision, or rule in its Contract Employee Agreement under the heading "Non-Disparagement" that prohibits employees, after their employment with Respondent ends, from making any derogatory or disparaging statements about Respondent, its customer, or any of their products or services, employees, consultants, officers, directors, or shareholders, and prohibits, directly or indirectly, taking any action which is intended to embarrass any of them.

(d.) Maintaining or enforcing a policy, provision, or rule in its Contract Employee Agreement under the heading "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims" that requires any

> employment dispute or claim to be resolved solely and exclusively by final and binding arbitration; expressly precludes employees from filing joint, class, or collective claims addressing their wages, hours, or other terms and conditions of employment, by requiring employees to waive their right to trial before a judge or jury in federal or state court, and requires employees to agree that all disputes be brought solely on an individual basis; and requires that employees agree to a class action waiver wherein employees waive their rights to a jury trial, class, or representative actions because all claims must be resolved exclusively through individual arbitration.

3. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent's maintenance of overly broad policies, provisions, or rules in its Contract Employee Agreement are unlawful, Respondent shall be ordered to rescind or revise those policies, provisions, or rules and advise employees in writing that said policies, provisions, or rules have been so revised or rescinded. Having found that Respondent maintained an unlawful "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims" provision, the Respondent shall be ordered to revise or rescind this policy, provision, or rule and acknowledge and advise its employees in writing that this policy, provision, or rule has been so revised or rescinded. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to an unlawful policy, provision, or rule. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 2 (2014). Respondent may comply with this order of rescission by reprinting the policies, provisions, or rules of its Contract Employee Agreement without the unlawful language or, in order to save the expense of reprinting the whole Contract Employee Agreement, it may supply its employees with inserts stating that the unlawful policies, provisions, or rules have been rescinded, or with lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad policies, provisions, or rules until it republishes the policy without the unlawful provisions. Any copies of the Contract Employee Agreement and/or policies that include the unlawful policies, provisions, or rules must include the inserts before being distributed to employees. *Guardsmark, LLC*, 344 NLRB at 812 fn. 8; *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 2–3.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[16]

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining or enforcing a policy, provision, or rule that prohibits disclosure of all information relating to the business operations of the Respondent or its customer without the prior written consent of the Respondent or its customer; and disclosure by employees, or use for their own benefit, confidential information belonging to Respondent or its customer related to their respective business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, and personnel information (including, but not limited to, names, educational background, prior experiences, and availability).

(b) Maintaining or enforcing a policy, provision, or rule that limits employee use of Respondent's customer's email and internet systems solely for the purposes of completing the contract assignment, and prohibits use of the customer's systems to transmit, download, or distribute offensive materials, language, offensive images, or any other inappropriate material, and provides that the employee has no individual rights to the contents or use of the customer's computer resources.

(c) Maintaining or enforcing a policy, provision, or rule that prohibits employees, after their employment with Respondent ends, from making any derogatory or disparaging statements about Respondent, its customer, or any of their products or services, employees, consultants, officers, directors, or shareholders, and prohibits, directly or indirectly, taking any action which is intended to embarrass any of them.

(d) Maintaining or enforcing a policy, provision, or rule that requires any employment dispute or claim to be resolved solely and exclusively by final and binding arbitration; expressly precludes employees from filing joint, class, or collective claims addressing their wages, hours, or other terms and conditions of employment, by requiring employees to waive their right to trial before a judge or jury in federal or state court, and requires employees to agree that all disputes be brought solely on an individual basis; and requires that employees agree to a class action waiver wherein employees waive their rights to a jury trial, class, or representative actions because all claims must be resolved exclusively through individual arbitration.

(e) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of the Board's Order, revise or rescind the policy, provision, or rule in its Contract Employee Agreement under the heading "Confidentiality and Data Security" that prohibits disclosure of all information relating to the business

operations of the Respondent or its customer without the prior written consent of the Respondent or its customer; and disclosure by employees, or use for their own benefit, confidential information belonging to Respondent or its customer related to their respective business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, and personnel information (including, but not limited to, names, educational background, prior experiences, and availability).

(b) Within 14 days of the Board's Order, revise or rescind the policy, provision, or rule in its Contract Employee Agreement under the heading "E-Mail and Internet Policy" that limits employee use of Respondent's customer's email and internet systems solely for the purposes of completing the contract assignment, and prohibits use of the customer's systems to transmit, download, or distribute offensive materials, language, offensive images, or any other inappropriate material, and provides that the employee has no individual rights to the contents or use of the customer's computer resources.

(c) Within 14 days of the Board's Order, revise or rescind the policy, provision, or rule in its Contract Employee Agreement under the heading "Non-Disparagement" that prohibits employees, after their employment with Respondent ends, from making any derogatory or disparaging statements about Respondent, its customer, or any of their products or services, employees, consultants, officers, directors, or shareholders, and prohibits, directly or indirectly, taking any action which is intended to embarrass any of them.

(d) Within 14 days of the Board's Order, revise or rescind the policy, provision, or rule in its Contract Employee Agreement under the heading "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims" that requires any employment dispute or claim to be resolved solely and exclusively by final and binding arbitration; expressly precludes employees from filing joint, class, or collective claims addressing their wages, hours, or other terms and conditions of employment, by requiring employees to waive their right to trial before a judge or jury in federal or state court, and requires employees to agree that all disputes be brought solely on an individual basis; and requires that employees agree to a class action waiver wherein employees waive their rights to a jury trial, class, or representative actions because all claims must be resolved exclusively through individual arbitration.

(e) Furnish all current employees with inserts for the Contract Employee Agreement that (1) advise that the unlawful policies have been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Contract Employee Agreement that (1) does not contain the unlawful policies, or (2) provides the language of lawful rules.

(f) Within 14 days after service by the Region, post at its facility in Atlanta, Georgia, and at its facilities throughout the United States,[17] copies of the attached notice marked

[17] In its post-hearing brief the General Counsel included a recommended order that set forth in

"Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 5, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 23, 2016

Thomas M. Randazzo
Administrative Law Judge

specific locations in the United States where the Respondent's Notices should be posted. That information, however, is not found in the record. I find that the specific locations of the postings are a matter more appropriately left for the compliance stage of this proceeding.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a policy, provision, or rule in our Contract Employee Agreement or elsewhere, under the heading of "Confidentiality and Data Security" that prohibits your disclosure of all information relating to the business operations of the Company or our customer without the prior written consent of the Company or our customer; and prohibits disclosure by you, or use for your own benefit, confidential information belonging to the Company or our customer related to our respective business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, and personnel information (including, but not limited to, names, educational background, prior experiences, and availability).

WE WILL NOT maintain or enforce a policy, provision, or rule in our Contract Employee Agreement or elsewhere, under the heading "E-Mail and Internet Policy" that limits your use of our customer's email and internet systems solely for the purposes of completing the contract assignment, and prohibits your use of our customer's systems to transmit, download, or distribute offensive materials, language, offensive images, or any other inappropriate material, and provides that you have no individual rights to the contents or use of our customer's computer resources.

WE WILL NOT maintain or enforce a policy, provision, or rule in our Contract Employee Agreement or elsewhere, under the heading "Non-Disparagement" that prohibits you, after your employment with us ends, from making any derogatory or disparaging statements about us, our customer, or any of our products or services, employees, consultants, officers, directors, or shareholders, and prohibits, directly or indirectly, your taking any action which is intended to embarrass any of us.

WE WILL NOT maintain or enforce a policy, provision, or rule in our Contract Employee Agreement or elsewhere, under the heading "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims" that requires any employment dispute or claim to be resolved solely and exclusively by final and binding arbitration; expressly

precludes you from filing joint, class, or collective claims addressing your wages, hours, or other terms and conditions of employment, by requiring you to waive your right to trial before a judge or jury in federal or state court, and requires you to agree that all disputes be brought solely on an individual basis; and requires that you agree to a class action waiver wherein you waive your rights to a jury trial, class, or representative actions because all claims must be resolved exclusively through individual arbitration.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, revise or rescind the unlawful policies, provisions, or rules in our Contract Employee Agreement under the headings "Confidentiality and Data Security," "E-Mail and Internet Policy," "Non-Disparagement," and "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims," mentioned above, and WE WILL advise you in writing that we have done so and that the unlawful policies, provisions, or rules will no longer be enforced.

WE WILL furnish you with inserts for the current Contract Employee Agreement that (1) advise that the unlawful paragraphs in the policies have been rescinded, or (2) provide the language of lawful policies; or WE WILL publish and distribute a revised Contract Employee Agreement that (1) does not contain the unlawful policies, provisions, or rules, or (2) provides the language of lawful policies, provisions, or rules.

INSIGHT GLOBAL, LLC
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board, Region 15
600 South Maestri Place, 7th Floor
New Orleans, LA 70130-3413
(504) 589-6362
Hours: 8:00 a.m. to 4:30 p.m. CT

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-161491 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6362.